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## NOTE

### DISSECTING ELECTRONIC ARTS' *SPORE*: AN ANALYSIS OF THE ILLICIT TRANSFER OF COPYRIGHT OWNERSHIP OF USER-GENERATED CONTENT IN COMPUTER SOFTWARE

*Andrew P. Connors*<sup>†</sup>

#### ABSTRACT

This Note addresses the legality of a new kind of “shrink-wrap” End User License Agreement (EULA) contained within a computer software installation that purports to transfer copyright in works created with the software from the user of the software to the manufacturer of the software. This Note analyzes the enforceability of this type of contract in the context of Electronic Arts’ much-lauded computer game, *Spore*. Rather than a conventional game that relies on in-house graphic designers and animators for its content, *Spore* relies on the collective creativity of its millions of users to make most of the content in the game. By way of a built-in three-dimensional modeler, users create advanced three-dimensional objects, including virtual organisms, buildings, vehicles, and spaceships, which are uploaded to a central server and distributed to all game users. Subsequently, the individual users download copies of these uploaded objects on their local machines automatically. Hence, the users interact with content created by other users, rather than the graphic designers and animators employed by the computer game manufacturer. Because case law supports the enforcement of this kind of “shrink-wrap” license, this unique EULA represents a novel threat to the intellectual property interests of authors of creative works. Hence, this Note argues that Congress should amend Title 17, Chapter 2 of the United States Code in order to preclude the enforcement of this type of contract, to the extent that it misappropriates the legitimate intellectual property interests of authors of creative works and subverts the policy underlying federal copyright protection.

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## I. INTRODUCTION

An author has important, exclusive rights in his creative work.<sup>1</sup> These rights, collectively known as “copyright,” provide an author with a monopoly<sup>2</sup> on the work for a limited time.<sup>3</sup> The government grants such rights because it recognizes that the provision of a unique reward to the author of a creative work ultimately benefits the public by encouraging the author to unleash his creative genius to the public.<sup>4</sup> Copyright does not need to remain exclusively with the author; the author is free to transfer copyright ownership to a third party.<sup>5</sup> However, as the government specially confers the right on the author, the author may only transfer his copyright ownership voluntarily.<sup>6</sup> Otherwise, the author transfers copyright ownership not as a reward for unleashing his creative genius to the public, but as the result of an unwitting, involuntary transfer.<sup>7</sup> This Note addresses such a transfer.

This Note addresses the legality of a new kind of “shrink-wrap” End User License Agreement (EULA) contained within a computer software installation. The EULA purports to transfer copyright in creative works made with the software from the software user to the software manufacturer. Despite the apparent involuntary and extra-contractual nature of such an EULA, case law supports the enforcement of this kind of “terms later” license.<sup>8</sup> Accordingly, this unique EULA represents a novel threat to the federally recognized copyright interests of authors in their creative works.<sup>9</sup> Hence, this Note argues that Congress should amend Title 17,

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1. For instance, an author has the exclusive right to reproduce his work, to sell copies of his work to the public, and to display his work publicly, among other exclusive rights. *See* 17 U.S.C. § 106 (2006).

2. *See supra* note 1 and accompanying text.

3. The time limit for the monopoly varies according to the status of the work. In the case of an independent author, the copyright will subsist for his lifetime plus seventy years. *See* 17 U.S.C. §§ 301–305 (2006).

4. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

5. *See generally* 17 U.S.C. § 201 (2006) (detailing copyright ownership and transfer thereof).

6. *See infra* notes 28–32 and accompanying text.

7. *See supra* note 4 and accompanying text.

8. *See generally* *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (setting forth the justification for the enforcement of a shrink-wrap license agreement).

9. The immediate transfer of copyright ownership in a creative work to a third party, other than a work made for hire, corrupts the underlying policy which seeks to expand the amount of creative works available to the public. *See Sony Corp.*, 464 U.S. at 429.

Chapter 2 of the United States Code<sup>10</sup> in order to preclude the enforcement of this type of contract, to the extent that it misappropriates the legitimate interests of authors and corrupts the underlying policy of federal copyright recognition.

Part II of this Note addresses the legal and technical background surrounding the transfer of copyright ownership by way of an EULA and provides an overview of the constitutional foundations of copyright law, including the policy considerations underlying the right. This Part also examines the statutory provisions of copyright enacted by Congress under its Article I, Section 8 powers<sup>11</sup> (collectively referred to as the "Copyright Act").<sup>12</sup> Part II pays particular attention to the protection of the computer graphics that are the subject of this Note, as well as the statutory provisions relevant to the transfer of copyright ownership. This Part follows with an examination of the contemporary legal rationale for the enforcement of shrink-wrap license agreements, as explained in the Seventh Circuit's seminal decision in *ProCD, Inc. v. Zeidenberg*.<sup>13</sup> Part II concludes with an overview of *Spore*, the computer software that is the focus of this Note.

Part III examines the application of copyright to the user-generated content in *Spore*. It first examines whether user-generated content in *Spore* is entitled to copyright protection. Concluding that the user-generated content satisfies federal copyright requirements, Part III then examines the enforceability of the shrink-wrap EULA in *Spore*. This Part pays particular attention to both the case law regarding such licenses and the requirements for transfer of copyright ownership under the Copyright Act.

Given the apparent enforceability of the EULA under a *ProCD* regime, Part IV of this Note recommends that Congress should amend the Copyright Act in order to appropriately preclude the enforceability of this type of agreement. This action would maintain the legitimate interests of authors and software manufacturers by returning to the policy considerations underlying federal copyright protection.

Part V concludes this Note.

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10. This chapter deals with copyright ownership and transfer. *See generally* 17 U.S.C. §§ 201–205 (2006).

11. U.S. CONST. art. I, § 8, cl. 8.

12. For ease of use, the author will use the term "Copyright Act," even though Congress has amended federal copyright law several times under numerous acts.

13. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

## II. BACKGROUND

A. *Legal Background*

As John Locke has suggested, an author's right to the exclusive exploitation of his work exists partly because the author takes things available to all<sup>14</sup> and applies his labor to those things to create something new.<sup>15</sup> In view of that principle, the Founders endeavored to protect the intellectual property of authors in the U.S. Constitution, which empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."<sup>16</sup> As James Madison explained in *The Federalist Papers*, the right to a creation naturally belongs to its creator; according to Madison, Great Britain had already recognized this principle before the founding of America.<sup>17</sup> Because the right was limited in duration under the proposed U.S. Constitution, Madison reflected that the public naturally benefited from the progress in artistic works encouraged by this intangible property right.<sup>18</sup> As the U.S. Supreme Court has explained, U.S. copyright law "is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."<sup>19</sup> Hence, the limited monopoly authorized by the federal Constitution and enabled by Congress seeks to benefit the public, rather than a private

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14. Things such as words, notes, colors, etc.

15. Although Locke did not write directly on intangible intellectual property rights, his writings support the moral underpinnings of both tangible and intangible property rights. As Locke explained:

Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

16. U.S. CONST. art. I, § 8, cl. 8.

17. THE FEDERALIST NO. 43 (James Madison).

18. *Id.*

19. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

party.<sup>20</sup> However, the public can attain this benefit only if the government grants the reward of a limited monopoly *to the author*.<sup>21</sup> This unique reward provides the incentive necessary to encourage private creative genius and for the private party to release that creative genius to the public.<sup>22</sup>

A copyright immediately vests in the author of a copyrightable work upon creation of the work.<sup>23</sup> To be copyrightable, the work must be (1) an original work of authorship, (2) fixed in any tangible medium of expression, and (3) capable of being perceived, reproduced, or otherwise communicated.<sup>24</sup> Original works of authorship include “pictorial, graphic, and sculptural works,” among other works.<sup>25</sup> The author of such a work has the exclusive right to reproduce the work and to display the work publicly, among other rights.<sup>26</sup> In the case of an artistic image, the author of the work has the exclusive right to reproduce the image in any kind of article, not merely the kind of article in which the artistic image was originally embodied.<sup>27</sup>

Because an author has a special relationship with his work,<sup>28</sup> and since his copyright in the work is a potentially valuable monopoly,<sup>29</sup> Congress has recognized that a transfer of copyright ownership<sup>30</sup> from an author to a third party should not occur haphazardly.<sup>31</sup> The author must intentionally transfer copyright ownership to a third party for a valid transfer to occur.<sup>32</sup> This explains why Congress imposed a writing requirement on the transfer of copyright ownership.<sup>33</sup> In fact, Congress went even further by expressly forbidding the involuntary transfer of copyright ownership.<sup>34</sup> However,

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20. *Id.*

21. *Id.*

22. *Id.*

23. 17 U.S.C. § 201(a) (2006).

24. *Id.* § 102(a).

25. *Id.* § 102(a)(5).

26. *Id.* § 106.

27. *Id.* § 113(a).

28. In other words, an author, by inputting his labor into his work, creates something that is inextricably tied to him. *See supra* note 3 and accompanying text.

29. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

30. Copyright ownership not only includes outright transfers of copyright, but also includes exclusive licenses. *See* 17 U.S.C. § 101 (2006) (defining “transfer of copyright ownership”).

31. Alice Haemmerli, *Take It, It's Mine: Illicit Transfers of Copyright by Operation of Law*, 63 WASH. & LEE L. REV. 1011, 1011-13 (2006).

32. *Id.*

33. The copyright act includes a typical “statute of frauds” which requires a transfer of copyright ownership to be signed and in writing. *See* 17 U.S.C. § 204 (2006).

34. *Id.* § 201(e).

Congress created an exception to the writing requirement by allowing a transfer of copyright ownership to occur by “operation of law.”<sup>35</sup> At least one court has held that the author must consent to a transfer of copyright ownership by operation of law, and hence this apparent exception to the requirement of a volitional transfer actually bolsters the requirement.<sup>36</sup> However, in an increasingly technological society, even an electronic writing conceivably satisfies the writing requirement,<sup>37</sup> and a voluntary transfer could occur, at least in the eyes of the law, by way of a suspect shrink-wrap EULA contained within a computer software installation.<sup>38</sup>

In the seminal case of *ProCD, Inc. v. Zeidenberg*, the United States Court of Appeals for the Seventh Circuit enforced the provisions of a shrink-wrap EULA contained within a computer software installation, despite the fact that the software developer presented the EULA to the software user long after the user had purchased the software.<sup>39</sup> Under traditional Uniform Commercial Code (UCC) analysis, the court should have confined itself to the original purchase of goods in order to determine the terms of the contract.<sup>40</sup> In other words, under the conventional UCC analysis, a contract existed once the user exchanged money for software with a vendor at the point of sale.<sup>41</sup> Flouting traditional contract law requiring a bargained-for exchange and mutual assent, the court enforced the “terms later” presented by the EULA at installation, even though the user did not agree to the terms during the initial transaction.<sup>42</sup> The court reached its holding based on the novel theory that the user voluntarily agreed to the terms of the transaction because the user did not return the software after learning of the objectionable EULA, or the even more extraordinary theory that, had the user known about the EULA at the time of purchase, he would have theoretically agreed to it.<sup>43</sup> Other courts have since followed the lead of *ProCD* and enforced the provisions of similarly

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35. *Id.* § 204(a).

36. *Brooks v. Bates*, 781 F. Supp. 202, 204-05 (S.D.N.Y. 1991).

37. *See, e.g.*, Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001–7006 (2006) (providing for the enforceability of a purely electronic contract).

38. For a thorough discussion, see Roger C. Bern, “*Terms Later*” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641 (2004).

39. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

40. Bern, *supra* note 38, at 647-49.

41. *Id.*

42. *ProCD*, 86 F.3d at 1448.

43. Bern, *supra* note 38, at 649-63.

suspect shrink-wrap license agreements.<sup>44</sup> Accordingly, the prevalence of courts that are willing to enforce such seemingly involuntary agreements risk the enforcement of a similar agreement that transfers ownership of copyright, even though such enforcement would be contrary to the fundamental precepts of American copyright law.<sup>45</sup> We now examine one such EULA.

### B. *A Computer Game with a Suspect EULA*

Historically, computer game companies have employed large teams of graphic artists and animators to produce appropriate graphics and animations for their games.<sup>46</sup> Under this traditional framework, computer game manufacturers own the copyrights to the particular graphics and animations contained within their games.<sup>47</sup>

However, a new methodology of creating the intellectual property contained within computer games has arisen that brings ownership of copyright into question. Electronic Arts (EA), a leading publisher, developer, and distributor of computer games,<sup>48</sup> has created a method to “procedurally generate” graphic animations.<sup>49</sup> Instead of relying on animators to preconceive of ways to animate particular three-dimensional models (3D models), procedural generation creates animations *on the fly*.<sup>50</sup>

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44. See, e.g., *Meridian Project Sys., Inc. v. Hardin Const. Co.*, 426 F. Supp. 2d 1101, 1106-07 (E.D. Cal. 2006) (citing approvingly to *ProCD* in order to enforce a shrink-wrap EULA); *SoftMan Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001) (citing to *ProCD* in order to enforce a shrink-wrap EULA); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998) (citing to *ProCD* to enforce the terms of a shrink-wrap agreement).

45. Congress forbids involuntary transfer of copyright. 17 U.S.C. § 201(e) (2006); Haemerli, *supra* note 31, at 1011-13.

46. Steven Johnson, *The Long Zoom*, N.Y. TIMES, Oct. 8, 2006 (Magazine), at 3, available at [http://www.nytimes.com/2006/10/08/magazine/08games.html?\\_r=1](http://www.nytimes.com/2006/10/08/magazine/08games.html?_r=1) (last visited Nov. 18, 2008).

47. Copyright in a work for hire, such as game animations, vests in the corporation by statute, and likely by contract. See 17 U.S.C. § 201(b) (2006).

48. Electronic Arts is the second largest computer game company based on market capitalization. ERTS: Industry: Multimedia & Graphics Software, <http://finance.yahoo.com/q/in?s=ERTS> (follow “Multimedia & Graphics Software” hyperlink under Industry/Category heading) (last visited Nov. 7, 2009).

49. For example, procedural generation is able to determine how a modeled animal with long legs and hooves should behave. See Greg Kasavin, E3 06: Spore Creature Editor Hands On (May 10, 2006), <http://www.gamespot.com/pc/strategy/spore/news.html?sid=6150118> (last visited Sept. 13, 2008).

50. *Id.*



Hence, the *computer game* intelligently animates user-supplied 3D models.<sup>51</sup> Using this technology, EA has created a computer game called *Spore* where the *user* creates much of the content in the game.<sup>52</sup>

To much fanfare, EA released *Spore*, the first game built on the above-described technology.<sup>53</sup> In *Spore*, the game user guides a virtual organism through stages of life: from the primordial ooze, to sentience, to space, and beyond.<sup>54</sup> Through this progression, the user “evolve[s]” his virtual organism by editing it with a powerful 3D modeling tool.<sup>55</sup> The user utilizes a similar tool to create buildings, vehicles, and spaceships for his or her virtual organism’s “[c]ivilization” at progressing stages of the game.<sup>56</sup> Hence, the user does not passively interact with game objects that the computer game developer has placed in the game.<sup>57</sup> Instead, the user creates those game objects by using a non-trivial tool similar to the tools that a graphic artist would use to design those same game objects.<sup>58</sup> Through another technology known as “asynchronous sharing,” the local software uploads a user’s creations<sup>59</sup> to a central server while it simultaneously downloads creations previously uploaded in this manner by other users.<sup>60</sup> Hence, in addition to his or her own creations, a user’s local game world is populated with the various creations of other game users.<sup>61</sup>

In order to facilitate this creation-sharing and to provide for the sale of creation-related merchandise,<sup>62</sup> the *Spore* EULA contains some suspect

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51. *Id.*

52. See generally Matt Vella, *Spore: A Universe To Play In*, BUSINESSWEEK.COM, Sept. 8, 2008, [http://www.businessweek.com/innovate/content/sep2008/id2008095\\_995160.htm](http://www.businessweek.com/innovate/content/sep2008/id2008095_995160.htm) (last visited Dec. 21, 2008) (a mainstream review of *Spore*, a game using the above-described technology that emphasizes the game’s strong reliance on user-generated content).

53. *Id.*

54. Marielle Messing, *An Intelligently Designed Game*, NEWSWEEK BLOG, Apr. 20, 2008, <http://www.blog.newsweek.com/blogs/current/archive/2008/04/20/your-intelligent-design-here.aspx> (last visited Sept. 14, 2008).

55. *Id.*

56. *Id.*

57. See *supra* notes 54-56 and accompanying text.

58. This is in contrast to the traditional game development framework. See *supra* note 46 and accompanying text.

59. These creations include the user’s creature, buildings, vehicles, and spaceships.

60. See Marielle Messing, *An Intelligently Designed Game*, NEWSWEEK BLOG, Apr. 20, 2008, <http://www.blog.newsweek.com/blogs/current/archive/2008/04/20/your-intelligent-design-here.aspx> (last visited Sept. 14, 2008). Asynchronous sharing has also been dubbed “massively single-player online gam[ing].” See *id.*

61. *Id.*

62. EA sells merchandise t-shirts, mugs, and other articles on the “Official Spore Store.” The store is available at <http://www.zazzle.com/sporestore> (last visited Nov. 18, 2008).

language under the heading of “Intellectual Property Rights” and the subsection “Your Contributions,” stating:

In exchange for use of the Software, and to the extent that your contributions through use of the Software give rise to any copyright interest, you hereby grant EA an exclusive, perpetual, irrevocable, fully transferable and sub-licensable worldwide right and license to use your contributions in any way and for any purpose in connection with the Software and related goods and services, including the rights to reproduce, copy, adapt, modify, perform, display, publish, broadcast, transmit, or otherwise communicate to the public by any means whether now known or unknown and distribute your contributions without any further notice or compensation to you of any kind for the whole duration of protection granted to intellectual property rights by applicable laws and international conventions.<sup>63</sup>

Hence, the EULA purports to transfer the exclusive “bundle of rights”<sup>64</sup> that ordinarily and properly belong to the author of a creative work to a third party that has merely provided the tools to create the work. The EULA requires the transfer despite the U.S. Constitution’s explicit requirement that the author receive these exclusive rights and despite the underlying public policy concerns of federal copyright law.<sup>65</sup> Further, this suspect transfer of copyright ownership is not confined to one game. EA has expressed a willingness to produce more games using the above-described technology, and presumably under the same constricting licensing terms.<sup>66</sup> Accordingly, this Note examines the propriety of the EULA’s purported transfer of copyright ownership in further detail below.

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Users can also create a comic book featuring their creations by visiting <http://www.mashon.com/spore/> (last visited Oct. 18, 2009). Additionally, users can create figurines of their creatures at <http://www.sporesculptor.com/> (last visited Oct. 18, 2009).

63. END USER LICENSE AGREEMENT (*Spore* DVD-ROM, rel. Sept. 7, 2008) (shown to the user at installation), available at [http://www.ea.com/portal/pdf/legal/Spore\\_End\\_User\\_License.pdf](http://www.ea.com/portal/pdf/legal/Spore_End_User_License.pdf).

64. The “bundle of rights” includes the right to reproduce the work and publicly display the work, among other rights. See 17 U.S.C. § 106 (2006).

65. See *supra* notes 14-22 and accompanying text.

66. See Brian D. Crecente, ‘*Spore*’ Is the New Video Game of Life, ROCKY MOUNTAIN NEWS, Sept. 4, 2008, <http://www.rockymountainnews.com/news/2008/sep/04/spore-is-the-new-video-game-of-life/> (last visited Dec. 22, 2008).

III. DISSECTING ELECTRONIC ARTS' *SPORE*A. *A User's Copyright*

As the *Spore* EULA alludes to,<sup>67</sup> a user's creation may not meet copyright requirements. If this is the case, then the problematic nature of a transfer of ownership of the unique "bundle of rights" associated with the creation is moot, since no such rights exist. To be copyrightable, the creation must be:

- (1) an original work of authorship,
- (2) fixed in any tangible medium of expression, and
- (3) capable of being perceived, reproduced, or otherwise communicated.<sup>68</sup>

Whether a user's creation is "original" within the meaning of the Copyright Act depends on the nature of the work itself.<sup>69</sup> Further, the extent that *Spore's* 3D modeling tool allows for a reasonable amount of artistic creativity is also a consideration, since the user must provide the creative genius behind the work, rather than EA and its employees. If *Spore's* 3D modeling tool lacks substantive depth, then the creation is nothing more than the outgrowth of EA's creative genius, and hence the user has no copyright interest in the creation, as the creation is nothing more than one of a finite number of permutations of the game, all of which rightly belong to EA.<sup>70</sup> Hence, this Part analyzes whether a user has a copyright interest in his *Spore* creation. This Part concludes that a user's work can satisfy all three requirements of the Copyright Act, and is therefore copyrightable.<sup>71</sup>

## 1. Original Work of Authorship

We start our analysis with originality, a cornerstone provision of the Copyright Act.<sup>72</sup> Congress intentionally left "original work of authorship"

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67. The *Spore* EULA carefully does not suggest that a user has a copyright interest, explaining that a transfer of copyright ownership occurs "to the extent that [the user's] contributions through use of the Software give rise to any copyright interest." END USER LICENSE AGREEMENT, *supra* note 63, § 2.B.

68. 17 U.S.C. § 102(a) (2006).

69. That is, a work with no originality is not copyrightable. *See supra* Part II.A.

70. That is, the work is nothing more than a part of the original work that is the computer software.

71. A user that creates something that is not original, either because of the trivial nature of the work or because the work is a copy of a famous work, would not have a copyright interest in the work. *See supra* Part II.A.

72. H.R. REP. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

undefined, content to rely on the courts to define the term.<sup>73</sup> Accordingly, the U.S. Supreme Court has held that “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>74</sup> As the Court further explained, “the requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>75</sup> So long as the work possesses some creative spark, the work is original—no matter how humble, crude, or obvious the creative element might be.<sup>76</sup> Original works of authorship include pictorial, graphical, and sculptural works,<sup>77</sup> which include “two-dimensional and three-dimensional works of fine, graphic, and applied art, . . . models, and technical drawings.”<sup>78</sup> Accordingly, the United States Court of Appeals for the Tenth Circuit has acknowledged that three-dimensional digital models, like those created by *Spore* users, “can be employed to create vivid new expressions fully protectable in copyright.”<sup>79</sup>

*Spore* includes several similar 3D modeling tools.<sup>80</sup> The user interacts with these tools during various stages of the game.<sup>81</sup> In the early stages of the game, the user plays as a single virtual organism (a “creature”), seeking food while avoiding predators.<sup>82</sup> As the user acquires food, he gains “DNA points” that eventually allow the user to “evolve” his creature, or manipulate it with the 3D modeling tool.<sup>83</sup> Eventually, a user’s creature establishes a civilization, at which point the user can create buildings with a similar 3D modeling tool.<sup>84</sup> In the later stages of the game, the user enters space, at which point he creates a spaceship with another 3D modeling tool.<sup>85</sup> Although all of these 3D modeling tools offer the potential for the

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73. *Id.*

74. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

75. *Id.*

76. *Id.*

77. 17 U.S.C. § 102(a)(5) (2006).

78. *Id.* § 101 (further defining “pictorial, graphic, and sculptural works,” among other terms).

79. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1265 (10th Cir. 2008).

80. *See supra* notes 49-55 and accompanying text.

81. *Id.*

82. *Id.*

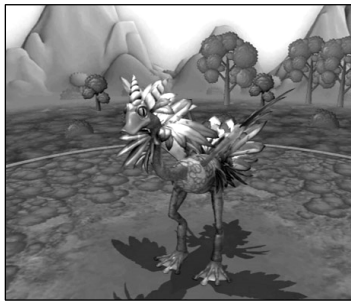
83. *See* Messing, *supra* note 54.

84. *Id.*

85. *Id.*

creation of copyrightable works, this Note will use the creature-creator tool as an example.<sup>86</sup>

A user's creature could look something like this:



**Figure 1. A Creature Made in *Spore***<sup>87</sup>

In designing his creature, a user has the choice of a multitude of parts.<sup>88</sup> The user may stretch and skew the parts, including the central body of the creature, as he sees fit.<sup>89</sup> The user may place the parts in any position.<sup>90</sup> The game does not confine the user to real-world conventions.<sup>91</sup> Thus, the user may create one-eyed creatures, creatures with parts in odd places, creatures with three legs, and any number of other peculiar and creative configurations.<sup>92</sup> As of this writing, EA's centralized *Spore* server contains approximately 123,000,000 user creations, all varying in creative merit.<sup>93</sup> Ultimately, originality is subjective in nature, and a user's creation may or may not satisfy the minimal level of creativity required by the U.S.

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86. *Spore* also includes a tool for outfitting creatures with interesting clothing, for creating music to associate with a creature, and for molding the creature as a less-complex organism in the "primordial ooze." As these tools lack the complexity of the other tools in the game, they are not analyzed in this Note.

87. Flynn DeMarco, *Spore Creature Creator* (June 11, 2008), <http://www.gamepro.com/article/previews/191568/spores-creature-creator/> (last visited Nov. 18, 2008).

88. See Kasavin, *supra* note 49; Messing, *supra* note 54. To get a sense of the described functioning of the creature tool, the reader may also download a free, deprecated version of the *Spore* Creature Creator at <http://www.spore.com/>.

89. See Kasavin, *supra* note 49; Messing, *supra* note 54.

90. See Kasavin, *supra* note 49; Messing, *supra* note 54.

91. See Kasavin, *supra* note 49; Messing, *supra* note 54.

92. See Kasavin, *supra* note 49; Messing, *supra* note 54.

93. *Spore* Profile Page, <http://www.spore.com/view/profile> (statistics last checked Oct. 2, 2009). Users can view others' creations and relevant statistics; registration and login are required.

Supreme Court.<sup>94</sup> Given the possibilities of the creature-creator tool, however, a user's creation of a copyrightable work appears possible, and individual creations, like the one above, appear to have the minimal artistic merit required.<sup>95</sup>

EA certainly seems to think so. When EA first shipped *Spore*, it needed to include some starter creations to populate local game worlds with content, since users had not yet had the chance to create the various creatures, buildings, vehicles, and spaceships that the game required to function properly.<sup>96</sup> Accordingly, EA commissioned a graphic designer to create several creatures to populate the game world.<sup>97</sup> Unlike game users, the designer retained a copyright interest in his creations and now collects royalties on merchandise sales.<sup>98</sup> This suggests that EA acknowledges the artistic creativity in game creations, and hence the originality required to obtain a copyright to a work. This serves to bolster the notion that a user's in-game creation potentially has the originality required for copyright protection.

## 2. Other Criteria

The Copyright Act further requires that a copyrightable work be fixed in a tangible medium of expression and be capable of perception, communication, or publication.<sup>99</sup> The Copyright Act provides for the satisfaction of these elements by "the aid of a machine or device."<sup>100</sup> Accordingly, the United States Court of Appeals for the Ninth Circuit has held that an image stored on a computer's hard disk is fixed in a tangible medium of expression.<sup>101</sup> Similarly, this type of image is perceived,

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94. *See supra* notes 74-76 and accompanying text.

95. *See, e.g.*, *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109-10 (9th Cir. 1970) (holding that copyright subsisted in certain greeting cards even though the individual components of the greeting cards were not original; the particular alignment of these individual components was original); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 104-05 (2d Cir. 1951) (holding copyright subsisted in certain mezzotint paintings, even though the paintings undergoing the mezzotint process were not the work of the producer of the paintings).

96. *See supra* notes 59-61 and accompanying text.

97. Daily Mail Reporter, *Engineer Becomes Successful Artist After Stroke Rewires His Brain*, MAIL ONLINE, (Aug. 20, 2008), <http://www.dailymail.co.uk/sciencetech/article-1046768/Engineer-successful-artist-stroke-rewires-brain.html> (last visited Nov. 18, 2008).

98. *Id.*

99. 17 U.S.C. § 102(a) (2006).

100. *Id.*

101. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007).

communicated, or published when it is displayed on a computer screen.<sup>102</sup> Since users can display the creatures on a computer monitor, and because they are fixed on a user's hard drive or on EA's central server, the 3D models created by *Spore* users satisfy the final copyright requirements. Since a user's creation satisfies copyright requirements, under the Copyright Act, those rights initially vest in the user.<sup>103</sup>

#### B. Enforcement of the Shrink-Wrap EULA

If, however, the *Spore* EULA is valid, then the user's copyright ownership immediately transfers from the user to EA.<sup>104</sup> EA certainly has legitimate interests that warrant the provision of a license from the user to EA; for instance, EA must ensure that it maintains an appropriate intellectual property interest in user creations to facilitate the sharing of creations between the local game worlds.<sup>105</sup> EA also markets various merchandise to users related to their creations, such as t-shirts, comic books, and figurines.<sup>106</sup> EA, however, only requires a non-exclusive license to maintain these interests, since EA's ability to carry out merchandising activities is not affected by the author concurrently exploiting his work as he sees fit.<sup>107</sup> The exclusive license purportedly granted by the EULA to EA is just that—exclusive. If the user were to attempt to reproduce his work outside the confines of the game world, it would be entirely possible under this regime for EA to sue the user for copyright infringement.<sup>108</sup> This begs the question: would a court enforce the transfer-of-copyright-ownership provision of this shrink-wrap EULA? This Part further analyzes this issue and concludes that a court that follows the ever-increasing trend set by

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102. *Id.*

103. 17 U.S.C. § 201(a) (2006).

104. See END USER LICENSE AGREEMENT, *supra* note 63, § 2.B.

105. Messing, *supra* note 54.

106. See *supra* note 62.

107. Apparently, the only reason that EA requires a monopoly on the use of *Spore* creations is so that it can preempt the sale of competing creation-related merchandise. See *supra* note 62 and accompanying text. It might even want to use *Spore* creations in other ventures, and exclude the use of those creations in potentially competing media, like movies. For instance, Twentieth Century Fox recently announced that it will partner with EA to make a *Spore* movie. *Spore To Evolve into Major Motion Picture*, [http://news.cnet.com/8301-17938\\_105-10370036-1.html](http://news.cnet.com/8301-17938_105-10370036-1.html) (last visited Oct. 19, 2009).

108. See 17 U.S.C. § 501 (2006) (allowing a copyright owner, which includes an exclusive licensee, to bring an infringement suit against any unauthorized infringer, even the original author). Such an infringement suit entails other registration requirements outside of the scope of this Note.

*ProCD* would enforce this provision, notwithstanding the Copyright Act's requirement that a transfer of copyright ownership be voluntary.

### 1. Voluntary Transfer of Copyright Ownership

Congress sought to ensure that transfers of copyright ownership were "unequivocally intentional" when it amended the Copyright Act in 1976.<sup>109</sup> Accordingly, Congress amended the Copyright Act to require the transfer of copyright ownership to occur by a signed writing,<sup>110</sup> although it excluded transfers "by operation of law" from this requirement.<sup>111</sup> Despite this exception, Congress expressly forbids the involuntary transfer of copyright ownership in the Copyright Act.<sup>112</sup> At least one court has recognized that "operation of law" cannot transfer copyright ownership without the express or implied consent of the copyright owner.<sup>113</sup> Hence, all of the ways that an author of a creative work can transfer copyright ownership require the knowledge and consent of the author.

The fact that Congress intended to require an author of a creative work to knowingly and voluntarily transfer his copyright ownership is further strengthened by the writing requirement of the Copyright Act. The Copyright Act requires an author of a creative work to transfer copyright ownership in the work by way of a signed writing, notwithstanding those transfers executed by operation of law.<sup>114</sup> Courts encountering this issue traditionally juxtapose the writing requirement with an impermissible oral agreement transferring copyright ownership.<sup>115</sup> Hence, courts interpret this portion of the Copyright Act to preclude an oral transfer of copyright ownership,<sup>116</sup> but not necessarily an electronic writing. This is because of the policy considerations underlying the writing requirement of the Copyright Act.<sup>117</sup> The writing requirement "prevents misunderstandings by spelling out the terms of a deal in black and white, forces parties to clarify their thinking and consider problems that could potentially arise, and encourages them to take their promises seriously because it's harder to backtrack on a written contract than on an oral one."<sup>118</sup> An electronic

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109. Haemmerli, *supra* note 31, at 1011-12.

110. 17 U.S.C. § 204(a) (2006).

111. *Id.*

112. *Id.* § 201(e).

113. *Brooks v. Bates*, 781 F. Supp. 202, 205 (S.D.N.Y. 1991).

114. 17 U.S.C. § 204(a).

115. *See, e.g., Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 556-57 (9th Cir. 1990).

116. *Id.*

117. *Id.*

118. *Id.* at 557.



document achieves these same ends. This further suggests that Congress had no concern for precluding electronic writings, but only oral agreements.

Additionally, a recent federal statute allows for the enforcement of contracts executed entirely in electronic form.<sup>119</sup> Under the Electronic Signatures in Global and National Commerce Act (“E-SIGN Act”), “a signature, contract, or other record relating to [an interstate commerce transaction] may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”<sup>120</sup> The E-SIGN Act expressly states that it does not “limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law *other than a requirement that contracts or other records be written, signed, or in nonelectronic form.*”<sup>121</sup> Accordingly, the E-SIGN Act further suggests that a transfer of copyright ownership may occur by way of an electronic writing with an electronic signature. This leaves us with one final question: can a third party receive copyright ownership from an author who transfers that interest by way of the instant EULA, since the author does so with knowledge and consent in some sense, but fails to voluntarily transfer the ownership interest in the purest sense of that term?

## 2. An Enforceable Agreement Under *ProCD*

A court that follows *ProCD* jurisprudence would likely enforce the instant EULA, since *ProCD* suggests that shrink-wrap EULAs are actually voluntary contracts, despite their after-the-fact nature.<sup>122</sup> In *ProCD*, the United States Court of Appeals for the Seventh Circuit enforced an EULA contained within a computer software installation, even though the purchaser of the software could not know of the license terms when he purchased the software at the point of sale.<sup>123</sup>

Under the conventional wisdom of the Uniform Commercial Code (UCC), a user’s purchase of software at the retail point of sale constitutes an acceptance of the retailer’s offer to sell the software by placing the software on the store shelf, instantly forming a contract.<sup>124</sup> Under this reasoning, the later presentation of a license agreement either constitutes a confirmation of the contract, or it constitutes a modification of the contract,

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119. See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001–7006 (2006).

120. *Id.* § 7001(a)(1).

121. *Id.* § 7001(b)(1) (emphasis added).

122. See *supra* notes 39–45 and accompanying text.

123. *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1455 (7th Cir. 1996).

124. Bern, *supra* note 38, at 647.

enforcement of each of which the UCC precludes under sections 2-207 and 2-209, respectively.<sup>125</sup>

In contrast, the Seventh Circuit reasoned that the transaction included additional terms at the point of sale, because the software box included a disclaimer, which, in small print, indicated that use of the software was conditioned on an enclosed EULA.<sup>126</sup> The court viewed the inclusion of this condition as “reasonable,” since it was unreasonable to expect the software developer to attach the entire EULA to the box.<sup>127</sup> The court further viewed the condition fair in light of the fact that if the software purchaser did not agree to the terms of the EULA, the purchaser could return the software for a refund.<sup>128</sup> The court finally assured itself of the voluntary nature of the contract by suggesting that the economic efficiency of the transaction implied that the purchaser accepted the inherent cost of this kind of purchase.<sup>129</sup> The court did recognize, however, that a shrink-wrap license is not enforceable if it is unconscionable or violates a rule of positive law.<sup>130</sup> Since it is usually difficult to demonstrate unconscionability,<sup>131</sup> a positive law exception serves as the only realistic possibility for preserving the copyright interests of authors of creative works under the *Spore* EULA. Hence, the positive law exception of an involuntary transfer of copyright ownership may serve to defeat the enforceability of the *Spore* EULA and preserve the user’s copyright interest in his creative work.

However, a *Spore* user appears to voluntarily accept an offer qualified by a shrink-wrap EULA in the same way that the user accepted the additional conditions of the shrink-wrap EULA in *ProCD*. The *Spore* box includes a statement indicating that the user must agree to an included license agreement in order to play the game, just like the user in *ProCD*.<sup>132</sup> At installation, the *Spore* user agrees to the EULA and has the option to return the software, just like the user in *ProCD*.<sup>133</sup> The *Spore* user also separately agrees to an EULA when he creates an online account in order to facilitate

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125. *See id.* at 648.

126. *Id.* at 650.

127. *Id.* at 651.

128. *Id.* at 653.

129. *See ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1450, 1451-52 (7th Cir. 1996) (explaining the inherent costs associated with common transactions with terms unknown to the purchaser at the time of purchase).

130. *Id.* at 1450.

131. *See, e.g., Dumais v. Am. Golf Co.*, 150 F. Supp. 2d 1182, 1191-92 (D.N.M. 2001).

132. *SPORE* (DVD-ROM, rel. Sept. 7, 2008). The reader can find the notice on the back of the box.

133. *Id.*

the sharing process integral to the game.<sup>134</sup> This goes beyond the facts of *ProCD*. Hence, under the *ProCD* regime, *Spore* users appear to be bound by the EULA, and this seems to comply with the positive law requirement of the Copyright Act that a user voluntarily transfer ownership of his copyright, at least as that term is understood under *ProCD* and under federal copyright law.<sup>135</sup>

#### IV. CONGRESS SHOULD AMEND THE COPYRIGHT ACT

Although the *Spore* EULA appears to satisfy the requirement of a voluntary transaction under federal copyright law and the *ProCD* regime, the special nature of a transfer of copyright ownership still casts a shroud over the transaction. Given the rather daunting language presented by the EULA and the rigorous legal knowledge required to appreciate its implications, a typical user likely lacks the sophistication to appreciate the rights given up by the user when agreeing to the requirements of the EULA.<sup>136</sup> While failure to know the terms of a contract does not ordinarily excuse a person from the terms of a contract,<sup>137</sup> the special nature of the transfer of copyright ownership heightens the status of the transaction.<sup>138</sup> Therefore, although the user appears to voluntarily accept the EULA under a strict understanding of the law, deference to the special protection afforded to authors of creative works along with the underlying policy considerations of federal copyright law warrants additional federal statutory protections for the rights of authors in their creative works.<sup>139</sup>

Rather than vest ownership of a copyright in an artistic work, the EULA, as enforced, vests ownership in a third party that provides the tool used to create the work.<sup>140</sup> Under a traditional understanding of copyright, a paintbrush salesman could not claim copyright over those things created by customers with his paintbrushes.<sup>141</sup> To put it in modern terms, Microsoft

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134. *Id.*

135. *See supra* Part II.B.

136. *See supra* Part II.B and note 60.

137. *See, e.g.*, *Stawski v. Stawski*, 43 A.D.3d 776, 778 (N.Y. 2007) (“One need not be an attorney or a Fulbright scholar to know the folly of signing a legal document without an understanding of its import.”).

138. *See supra* notes 28-32 and accompanying text.

139. *Id.*; *see supra* notes 14-22 and accompanying text.

140. *See supra* note 63.

141. *See generally* Part II.A (explaining that the provider of the tool does not receive copyright protection, but rather the author that, through his creative spark, creates something new).

could not claim that it owned the rights to something created with Word.<sup>142</sup> While American copyright law requires the author to reap the rewards of his creative genius, the EULA turns the tables and actually deprives the author of the ability to reap the rewards of his work.<sup>143</sup> The exclusive license purportedly granted by the EULA is just that—exclusive. If the author were to attempt to produce his work outside the confines of the game world, it would be entirely possible under this regime for the game manufacturer to sue the author for copyright infringement.<sup>144</sup> Instead of providing an incentive to spur creative genius of authors as required under the Federal Constitution and federal copyright law, the *Spore* EULA prevents the creator from reaping the incentive and instead confers the reward on a third party that is not responsible for the creative genius behind the work.<sup>145</sup> Without the incentive provided by federal law, the public suffers, as it ultimately benefits from the reward initially conferred on authors.<sup>146</sup> Accordingly, Congress should amend Title 17, Chapter 2 of the United States Code in order to preclude the enforcement of shrink-wrap EULAs that purport to transfer copyright ownership of works created by users of the software to the software manufacturer to the extent that such a license misappropriates an author's legitimate copyright interest in his creative work.

While EA certainly has a legitimate interest in protecting the integrity of its software and seeking reasonable profits from the sale of related merchandise, EA does not require a perpetual, exclusive license to promote this interest. Hence, Congress should amend the Copyright Act to provide that the transfer of copyright ownership may not occur by way of an EULA whose terms are not fully disclosed to a user at the point of sale prior to purchase. Since transfer of copyright ownership does not include non-exclusive licenses,<sup>147</sup> amending the Copyright Act in this way would appropriately protect the interests of game manufacturers wishing to utilize the unique potential for profits presented by the technology underlying *Spore*. More importantly, such an amendment would adequately preserve the interests of authors in their copyrighted works, consistent with the

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142. *Cf.* Part II.A.

143. *See supra* note 108.

144. *See* 17 U.S.C. § 501 (2006) (providing that a copyright owner, which includes an exclusive licensee, may bring an infringement suit against any unauthorized infringer, even the original author). Such an infringement suit entails other registration requirements outside of the scope of this Note.

145. *See supra* notes 14-22 and accompanying text.

146. *Id.*

147. 17 U.S.C. § 101 (2006).

rationale underlying copyright protection provided by the U.S. Constitution.<sup>148</sup>

By returning the unique reward of a limited monopoly to the author of a creative work, the type of amendment proposed by this Note would provide an appropriate incentive for an author to release his work to the public and exploit it accordingly.<sup>149</sup> Without such an amendment, while typical users of *Spore* and like software programs will no doubt produce many creations within the confines of the game world, a well-informed user that seeks to exploit his creative work outside the game world will have a disincentive to do so, since he will risk an infringement suit. Hence, the current regime potentially deprives the public of the creative genius of the author, instead confining the genius to the whims of the game manufacturer. Further, the author is left with no monetary reward if the manufacturer exploits his work beyond the limited realm of the digital images and merchandise related to the game. Accordingly, Congress should amend the Copyright Act to correct these warped incentives and return to the proper scheme of private and public benefits mandated by the Federal Constitution and federal copyright law.<sup>150</sup>

## V. CONCLUSION

Federal copyright recognition exists to reward the creativity of authors, not third parties that happen to provide the tools of the trade to those authors. After all, the limited commodity that the law seeks to increase is creativity and the product of that creativity. As a constitutional matter, this policy exists to benefit the public, not the author. As a moral matter, an author shares a special bond with his creative work. For these reasons, Congress has recognized that an author cannot involuntarily transfer ownership of his copyright to a third party. Yet, this is precisely what EA has attempted to do by including the peculiar terms in *Spore*'s EULA that govern user-generated content. When taken with the decision of the court in *ProCD*, the shrink-wrap EULA included with *Spore* poses a unique threat to the traditional framework governing transfer of copyright ownership. Accordingly, Congress should amend Title 17, Chapter 2 of the United States Code to properly preclude the enforcement of this shrink-wrap agreement, and thereby preserve the fundamental policy underlying copyright law.

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148. *See supra* notes 14-22 and accompanying text.

149. *Id.*

150. *Id.*